

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

Original with affidavit of mailing

74-2267

To be argued by
STEVEN KIMELMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2267

UNITED STATES OF AMERICA,

Appellee,

—against—

OSWALDO LONDONO-ECHEVERRY,

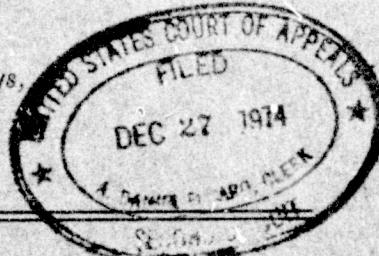
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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—against—

OSWALDO LONDONO-ECHEVERRY,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Oswaldo Londono-Echeverry appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Costantino, *J.*) entered September 20, 1974. Appellant was convicted, after a jury trial, on one count of possession with intent to distribute and one count of distribution of one-eighth of a kilogram of cocaine in violation of Title 21, United States Code, Section 941(a)(1) and Title 18, United States Code, Section 2.* Appellant was sentenced to concurrent prison terms of four years on each count with a six year special parole term to follow. Appellant was also ordered to be deported upon the completion of his prison term at the Federal Correc-

* Also named in the indictment was Reynaldo Santiago-Lugo ("Santiago"). On March 11, 1974, Santiago pleaded guilty to both counts of the indictment and thereafter testified for the appellant.

tional Institution at Danbury, Connecticut, where appellant is presently serving his sentence.

On this appeal, appellant's sole contention is that the trial Court erred by its failure to instruct the jury on appellant's "theory of the case." Although appellant's trial counsel never requested such an instruction, appellant now argues that its absence constitutes "plain error" requiring reversal of appellant's conviction.

Statement of the Case

A. The Government's Case

On January 24, 1974, a paid informant of the Drug Enforcement Administration, Anibel Romeo, arranged with Reynaldo Santiago-Lugo to purchase two-eighths of a kilogram of cocaine for the sum of \$8,000 (28-29).* Further conversations resulted in an 8:00 P.M. meeting on January 28, 1974 between Santiago, Romeo and Special Agent Michael Gray of the Drug Enforcement Administration who was acting in an undercover capacity (30-33). Throughout this meeting, which occurred in Gray's undercover car parked in the vicinity of Roosevelt Avenue and Junction Boulevard in the Jackson Heights area of Queens, Romeo acted as interpreter for Gray who spoke only English and for Santiago who spoke only Spanish.

Santiago did not have any cocaine with him, therefore, he and Romeo left Agent Gray waiting while they went to look for Santiago's connection (318). After an unsuccessful 25 minute search of several neighborhood bars, they returned to the Government car where it was then agreed that a second meeting would occur at 10:00 P.M. at the

* All references are to the trial transcript unless otherwise indicated.

same location (34-39). Santiago stated, "Yes, I'll try to be here with the man here waiting for you" (64). Santiago also reassured Romeo and Gray that the deal would go smoothly by stating, ". . . so be calm—I have . . . let's let him come—if you like it, all's well—if not—nothing's wrong" (68).

The entirety of the foregoing conversations between Santiago, Romeo and Gray were recorded by means of a Kel transmitter which had been placed on Romeo's person (40). The tape thereof (Government Exhibit 1) was played to the jury and, in addition, a transcript of the conversation was provided to each of the jurors (see Government Exhibit 2, Government's Appendix, 1a). Those conversations, which were, for the most part, in Spanish, were accurately translated into English (see stipulation, 49; and summation of defense counsel, 525-526).

At approximately 10:00 P.M., Santiago returned to the corner of Roosevelt Avenue and Junction Boulevard, this time in a car driven by the appellant (71-72). After appellant had parked around the corner, Gray and Romeo left the Government vehicle and got into the back seat of appellant's car (74-75). Santiago opened the glove compartment and took out a paper bag which he gave to appellant who, in turn, handed it to Agent Gray (75). Inside the paper bag was a plastic bag containing only one-eighth of a kilogram of cocaine (248-249) as opposed to the two-eighths anticipated by Gray (248-249). A general discussion then ensued between all the parties as to the price and quality of the cocaine.

Appellant, who spoke partially in English, participated fully in the negotiations for the sale of the cocaine. Following an unexplicated discussion between Santiago and appellant, the original \$4,000 sale price was reduced to \$3,600 (76, 88-89). Appellant then told Romeo and Gray

that if they were satisfied with the cocaine, he could get another one-eighth of a kilogram for them by 12:00 that same evening (77, 87-88, 90, 202-203). During these discussions, Special Agent Gray, after examining the package, handed it back to appellant, who in turn gave it back to Santiago (202). After agreeing on the new price of \$3,600, Gray asked appellant if he wanted Santiago to go with Gray to get the money from the Government car parked nearby. Appellant agreed and said that, while they were gone, he would move the car (90, 205). Santiago then left the car with Gray and Romeo and moments later, following a pre-arranged signal, both appellant and Santiago were arrested (80).

As with the conversations earlier that evening, the foregoing conversations, which involved appellant, were recorded and played to the jury (Government's Exhibit 1). In addition, a transcript was also provided to the jury (see Government's Exhibit 4; Government's Appendix, 17a). Romeo also testified at the trial that both the taped conversations and the English transcripts were accurate reflections of the conversations he had had with Gray, Santiago and the appellant on the night of January 28, 1974 (41, 43, 82). Moreover, he was able to specifically identify appellant's voice as portions of the tape were replayed for him (94-97).

Special Agent Gray also testified as to certain incriminating statements made by the appellant in English at the 10:00 P.M. meeting in appellant's car (198, 203). Portions of this conversation were played for Gray, who was also able to identify appellant's voice on the tapes (208-209).*

* During the cross-examination of Santiago and appellant, portions of the tape were again replayed. Although Santiago was able to identify his own voice on the tape of the first conversation (358), he was unable to identify the voices of any of the participants in the second conversation in which appellant [Footnote continued on following page]

B. The Defense Case

Both appellant and Santiago testified for the defense. Both testified that they were casual acquaintances who had met, completely by accident, shortly before 10:00 P.M. on the night of January 28, 1974. Appellant testified that he was pulling up in his car to the Asia Continental restaurant when he saw Santiago standing at the curb (259-260, 265, 378, 423). According to the defense, Santiago asked appellant for a ride to the 10:00 P.M. meeting at Roosevelt Avenue and Junction Boulevard, some ten blocks away (265, 378, 423-426). Throughout their testimony both Santiago and appellant emphatically denied that appellant had in any way participated in the transaction that followed. The defense contention was that appellant was merely an innocent bystander and not Santiago's source (e.g., 286, 383). Finally, Santiago specifically denied meeting with appellant that evening at the Las Acacias bar (306-307).

C. The Rebuttal Case

In rebuttal, the Government produced Special Agent Kiernan Kobell of the Drug Enforcement Administration who had maintained surveillance on Santiago on the night of January 28, 1974 (481-487). Agent Kobell testified that he had followed Santiago from the initial meeting with Gray and Romeo straight to the Las Acacias bar and observed Santiago enter that bar at approximately 9:30 P.M. A few minutes later, appellant drove up and also entered the bar. At approximately 10:00 P.M., appellant and Santiago left the bar together and entered appellant's car. They proceeded directly to the meeting place at Roosevelt Avenue and Junction Boulevard, which was two blocks away (486-487).

took part (360). When appellant testified, however, he was able to identify his own voice on the tape of the second conversation (457). Appellant also conceded, on direct examination, that some of the statements attributed to him on the transcript of the second conversation had, in fact, been made by him (386-388).

ARGUMENT

The failure of the trial court to give a specific instruction on appellant's "theory of the case" was not error.

Appellant claims that the trial court committed "plain error" by its failure to instruct the jury that "it was they who had to find that appellant made the statements attributed him by the Government, and that the transcript itself was of no independent probative value" (Appellant's Brief, 8-9). This request to charge, which was never made, apparently encompasses appellant's "theory of the case," i.e.—that appellant's voice was mistakenly identified on the tapes and transcripts by the Government witnesses.

Appellant's contention that the lack of such an instruction was plain error is patently frivolous. The only issue at the trial was whether appellant was Santiago's supplier or simply an innocent bystander along for the ride. To this end, six witnesses testified; four for the Government and two for the defense. The jury had ample opportunity to observe each of these witnesses and make its own determination as to their credibility. Moreover, the jury had a full opportunity to compare the voices of Gray, Romeo, Santiago and appellant on the witness stand with the voices identified as belonging to them on the tapes.* In addition, voice identification from the tapes was made even easier for the jury because appellant's voice appeared for the first time in the second conversation.** Finally, contrary

* The Government's summation stressed this point: "You listen to the voices, you heard the voices of everybody on the stand, you draw your own conclusions as to who was answering" (541).

** This point was also stressed in the Government's summation: ". . . listen to the first tape and you hear three voices. Anybody can do this, you don't have to be a skilled translator or [Footnote continued on following page]

to the implication in appellant's brief, the marginal notations on the transcripts, which identified the speakers, were hardly the basis upon which the jury concluded that appellant had directly and meaningfully participated in the sale. Thus, both Agent Gray and Romeo identified appellant's voice, as indeed, did appellant himself (386-388, 457). Moreover, the tapes and transcripts simply served to corroborate the recollection of Gray and Romeo. As such, it is mistaken to characterize appellant's belated request to charge as encompassing a "theory of the case" when the sole responsibility of the jury was to weigh the conflicting testimony of the witnesses. As stated in *Laughlin v. United States*, 474 F.2d 444, 455 (D.C. Cir. 1972), cert. denied, 414 U.S. 882 (1973):

"... but a claim that the jury should be instructed to acquit the defendant if the defense testimony denying guilt is believed can hardly be elevated to the status of a 'theory'. What is required before the theory of the case rule comes into play is a more involved theory involving 'law' or fact, or both, that is not so obvious to the jury".*

interpreter you just use your common sense and God-given intelligence and you hear three voices at that first meeting. You hear Santiago's voice, Romeo's voice, and Special Agent Gray's voice. And you listen to the tape of the second meeting there is a new voice. There is a fourth voice . . . and you listen, and you listen every time that fourth voice speaks, that new voice, the one you didn't hear on the first tape" (554).

* The cases cited by appellant are not supportive of his claim. Appellant's reliance on *United States v. Weiler*, 458 F.2d 474 (3rd Cir. 1972) is hardly pertinent. That case simply begs the question by stating the obvious requirement that, before a "defense theory" may properly be the subject of a request to charge, there must be evidence in the record to support the request. See also *United States v. Clark*, 498 F.2d 535 (2d Cir. 1974). *United States v. Blount*, 229 F.2d 669 (2d Cir. 1956) and *United States v. Blane*, 375 F.2d 249 (6th Cir.), cert. denied, 389 U.S. 835 (1967) each involved affirmances and hardly stand for the proposition that a defense contention concerning the credibility of witnesses can properly be termed a "theory of the defense."

Moreover, to the extent that appellant's "theory" should have received recognition, it did.

It is clear from the District Court's charge that appellant received the full benefit of his "far from compelling" claim that he was not a participant in the conversations to the extent the Government's evidence showed. See *United States v. Caci*, 401 F.2d 664, 670 (2d Cir. 1968), *vacated on other grounds, sub nom., Randaccio v. United States*, 394 U.S. 310 (1969); see also, *Herzog v. United States*, 235 F.2d 664, 667 (9th Cir.), *cert. denied*, 352 U.S. 844 (1956); *United States v. Blane*, 375 F.2d 249, 252 (6th Cir.), *cert. denied*, 389 U.S. 835 (1967).

In the instant case, the District Court not only correctly charged as to each of the essential elements of the offenses at issue (565-569) but included proper charges as to reasonable doubt (570-571) and burden of proof (571). Moreover, Judge Costantino specifically charged that the appellant could not be convicted if he was merely a bystander and not a participant (569). Without a doubt, this last instruction was in effect the "theory of the case." The Court also charged extensively as to the weight and credibility of the evidence proffered by the various Government and defense witnesses (575-578, 580). Finally, Judge Costantino instructed the jury that they should regard the tapes as they would any other piece of evidence (585). Examining this charge in the light of the relatively short trial (approximately 600 pages of transcript) and the simple issue of fact to be resolved, Judge Costantino's charge completely eliminated any need for additional specific instruction on the defense's "theory."

In view of the trial court's comprehensive charge; the complete sufficiency of the evidence; the simple issue of fact to be determined; and the absence of any request for this instruction by appellant's trial counsel, it is incon-

ceivable that the District Court's failure to sua sponte instruct the jury in the manner indicated by appellant warrants a reversal of this conviction. Appellant's substantial rights were fully protected.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: December 24, 1974

Respectfully submitted,

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APPENDIX

GOVERNMENT EXHIBIT 2

Conversation Between Special Agent Michael Gray (S/AG G.), Paul Anibel Romeo (AR), Reynaldo Santiago Lugo (SL) on January 28, 1974 at Approximately 8:00 P.M.

NOISE 35 Sec.

S/AG G: (Eng) OK. stay in on the West Side of Junction right behind the van. Do you want me to move up? Have the van kept in park. Ok. I consider my spot good . . . Do you see it . . . do you see him around anyplace?

AR: (Eng) No. I'll go in there.

S/AG G: (Eng) Where, when are you going to go?

AR: (Eng) Right now

S/AG G: (Eng) Did he say he might be there or what?

AR: (Eng) Yes, over there

S/AG G: (Eng) All right.

AR: Hey, how are you negro? I'm here with my brother in law . . . is everything ok? . . . and so . . . what? we brought that. Do you have two or . . .

SL: No. No for the time being we have two . . . what was I going to say . . . are we going to be able to go in the car.

AR: * * * * *
Do you want to go? Come on so you can meet my brother-in-law . . .

Government Exhibit 2

NOISE 23 Sec.

AR: Do you speak English?

SL: EH?

AR: Do you speak English?

SL: No, little brother. No

AR: SCOTTY

SL: Ok man—let's go—Pedro

S/AG G: (Eng) Pedro pleased to meet you, Pedro. Do you have merchandise?

SL: What does he say?

AR: That if you have anything?

SL: Let's go to . . . Let's go to 37th Avenue and 89th

S/AG G: (Eng) You have to go what to 37th Ave.?

AR: (Eng) 37th Ave. and what?
37th and what?

SL: And 89th

AR: To pick it up?

SL: Yes we are going there, to see someone there.

AR: (thumbling) 89th and 37th Avenue.
89th and 37th Avenue.

S/AG G: (Eng) How far away is that?

AR: (Eng) 2 Blocks

S/AG G: (Eng) 2 Blocks?

AR: Where's that?

Government Exhibit 2

SL: Here, here, one block up further and there we turn.

AR: Let's see—(Eng) two or three blocks

S/AG G: (Eng) Two or three blocks? Well, I don't want to drive around. Tell him I don't want to drive around with the money.

AR: (Eng) Yeah, yeah—(Spanish) Perhaps if he wants to stay we'll go over there the two of us.

SL: Ok, better.

AR: (Eng) Do you want to see the money—I don't want you to think it's all bullshit—

S/AG G: (Eng) Ask him if he wants to count it?

AR: Do you want to count it?

SL: No, no, how much is there in there?

AR: Eight

S/AG G: (Eng) Eight thousand—you see . . . here count it.

SL: No, no I already said no.

S/AG G: (Eng) But tell him; I'll wait here while you two go get the merchandise—because I'm not going to go in anyplace with the merchandise—I don't even want to see the merchandise—where it's coming from.

AR: Alright, alright

S/AG G: (Eng) But I want to look at it

AR: When I worked with . . . with the one we call Gilberto . . . with Gilberto—do you understand?

Government Exhibit 2

SL: Yes

AR: He remained in the car and I'd go see the "perico"

SL: Of course

AR: He remained with the money—and also apart from that, he doesn't even want to know where it comes from—nor where it isn't coming from . . . the "perico"—do you understand me?

SL: Yes, yes—let's go—and let's leave him alone. OK?

S/AG G: (Eng) Are you going to go get the merchandise?

AR: (Eng) Right—we're going to go see the guy to . . .

S/AG G: (Eng) Well, you've got to bring the merchandise back here—because I'm not going to go no place.

AR: (Eng) I know that

S/AG G: (Eng) OK

AR: (Eng) I'll take care of that

S/AG G: (Eng) Ok, Ok—I'll just tell wait right here . . . Is it settled . . .

(Laughter)

SL: (Eng) Me, no, no smoke here.

S/AG G: All right.

SL: (Eng) Eh—do you want this? No, you smoke it.

SL: (Eng) No. One Moment . . .

Government Exhibit 2

S/AG G: (Eng) Oh, later?

SL: (Eng) Yes.

S/AG G: (Eng) Oh, Ok.

SL: Let's go the two of us.

AR: Yes. Let's go

S/AG G: (Eng) Ok, now, how long will it take you to come back?

AR: How long does it take us?

SL: We're going from here to there—. . . half and hour.

AR: Half an hour?

SL: half an hour or less

AR: We're bringing the "perico" here. And we do the thing here in the car?

SL: Yes, yes, we will do it like that, we'll do it.

AR: Ok . . .

S/AG G: (Eng) Tell him that it should be good quality to send us.

AR: (Eng) Ok in half an hour we will come with the merchandise—we will be right here

S/AG G: (Eng) Now, I want you, I want good quality, good quality.

AR: OK

S/AG G: (Eng) No, but ask him—I want to know

AR: Is it good?

SL: Uh?

Government Exhibit 2

AR: Is the "perico" good?

SL: Of course, it is good stuff.

S/AG G: (Eng) because it going to cost (Spanish) "MUCHO DINERO"—se I want good quality.

AR: Do you understand him?

SL: Yes.

AR: That he has a lot of money and it should be good "perico".

SL: Yes, I understand, but does he want to take the two or an eighth?

AR: No

(BOTH SPEAK AT ONCE)

SL: There, there are the two eights.

AR: Yes

SL: Alright let's see—tell him to wait for us here.

S/AG G: (Eng) One half hour—that'll mean that I will give you until eight . . .

AR: (Eng) Yeah—eight-thirty.

S/AG G: (Eng) Eight-thirty-five.

AR: (Eng) Right

S/AG G: (Eng) Ok—don't be late because I don't want to wait here.

AR: Ok

SL: Tell him to drink a soda there or any old thing

Government Exhibit 2

AR: (Eng) Do you want to drink a . . .

S/AG G: (Eng) So, I'll just sit right here—because I don't want to go around carrying all the money

NOISE 15 Sec.

ONE HONK

NOISE 25 Sec.

AR: Mother Fucking night—with this rain—shit—this shitty rain.

SL: What was I going to say—how much business did you do with Gilberto?

AR: Gilberto?

SL: Gilberto . . .

AR: Where is he?

SL: Who, Gilberto?—he's up there . . . I spoke with the man now and he's going to be waiting with the stuff—he may want more money.

AR: Yeah, but you know that we're not that way—it's for good quality. You take us, we try it and if we like, we get the dough . . . if the "perico" is good there is no problem. We do the business.

SL: Of course—twice a week. He sells it

—NOISE—(short)

SL: Had you arrived there long before?

AR: No, we had just gotten there—because we had gone to get gas—so then . . .

SL: You called the house—did you not?

Government Exhibit 2

AR: Yes—and you weren't there by then.
SL: I called about five minutes after you called
AR: Uh, yeah?
SL: So I spoke with . . . about that.
AR: Yes
SL: I called but there was no one there . . .
AR: and that you were going to see me at eight.

(CONVERSATION

UNINTELLIGIBLE).

AR: Well this guy that we are going to see—is he trustworthy? the person that we are going to see.
SL: Yes—we're going there—he's trustworthy, brother . . .
AR: Uh?
SL: Yes, we work a lot—do you understand. He's a friend, we're going to visit.
AR: Is he young or what?
SL: Yes—no, no he's a man with a few . . .
AR: Because these young guys can be a lot of crap.

NOISE—walking—10 Sec.

SL: But what with the guy not being there—what's the big race for?
SL: (cont'd) It's up further
AR: Uh?

Government Exhibit 2

NOISE 35 Sec.

(Tape INTERMITTENT)
CONVERSATION UNINTELLIGIBLE

NOISE 1:10 Min.

CONVERSATION UNINTELLIGIBLE

NOISE 2:35 min.

AR: Is it very far?

SL: No, here at 89 and 37—some 3 blocks
from here but up there.

NOISE 35 Sec.

AR: (Eng) 89th Street and 37th Avenue,
89th Street and 37th Avenue
89th Street—we are going now.

INAUDIBLE

NOISE—1:35 Min.

AR: If we have to wait—I'll wait, you see—
but since we do always business together,
I don't want to get into a argument.

NOISE—35 Sec.

SL: Let's wait a little longer, brother

AR: Do you think that he will come?

SL: If I tell you the guy is coming—he'll be
here, do you see?—because since with
the money—one goes out for a while for
a stroll to someplace—then goes some
place else

AR: Yeah.

Government Exhibit 2

SL: So there you go around for a while . . . so then where are you people going to wait for me? I'll be coming back here.

AR: I don't know. You know what happens that we don't want to keep running around with so much money on us because one never knows what can happen—do you understand? I don't know—whatever might come up—a small problem—how do you know. It's a lot of money—\$8,000 dollars is a lot of money.

SL: A lot of money

AR: Because you see—for what we buy at 8 we make the 15 with it, and that's a lot of money, and we've got to take care of it.

NOISE 35 Sec.

AR: Oh boy . . .

NOISE (short)

AR: So it's not raining any more—how lucky, shit!

AR: (Cont'd) So the rain went away to the bitch that bore it—let's get the "perico" and we'll finish the whole deal.

NOISE 15 sec.

AR: (Eng) We have to wait? Do you want to wait?

S/AG G: (Eng) We'll have to wait.

AR: (Eng) Yes, we went looking for the guy all over—we went looking for the man all over—every every place we went we just

Government Exhibit 2

missed him. And now—he wants to go see a couple of places—you know.

SL: that he was there, but the man left.— that he went out for a little while—that the guy will be back again, but in a little while brother!

AR: (Eng) He says, you know—this guy goes back and forth all over the place. What do you think?

S/AG G: (Eng) Well, look it—I want to let you go, you know, you know, I wanted to go—I've brought some money—he was here—this isn't right—what do you want to do? If we do it tomorrow, will he be ready tomorrow?

AR: Do you think that for tomorrow—it will be ready? Surely for tomorrow?

SL: But couldn't you wait just a little bit longer

AR: Yes

S/AG G: (Eng) We'll come back in an hour.

AR: (Eng) We'll come back in one hour.

(Laughter)

AR: We'll be back in one hour. Right here at this same corner

SL: Very well, brother.

S/AG G: (Eng) You will have the merchandise—right?

SL: Ok, better this way, brother. Better

AR: Ok have everything ready.

Government Exhibit 2

SL: Yes, I'll try to be here with the man here waiting for you.

AR: Ok—please

SL: In an hour

S/AG G: (Eng) Wait a minute—and no matter what—be here, so that I . . .

AR: (Eng) He, will, he will.

S/AG G: (Eng) No, tell him—it's here.

AR: You are going to be here—whether it is or isn't—you are going to return?

SL: Ok

S/AG G: (Eng) Because tell him that I don't want to wait on the street with all of this money.

AR: (Eng) Yes—(spanish) he doesn't want to . . . you know . . . with so much money on him . . .

(Eng) What time is it?

S/AG G: (Eng) Ok, it's fifteen—does he have a watch?

AR: (Eng) Quarter to Nine—(Spanish) Quarter to nine. At quarter to ten.

S/AG G: (Eng) Tell him we will be back here at ten o'clock.

SL: Quarter to ten, at ten.

AR: At ten, here

SL: At ten, here

S/AG G: Ten o'clock, right?

AR: At ten, here.

Government Exhibit 2

S/AG G: (Eng) Now he will have the merchandise?

SL: (Eng) All right

AR: (Eng) Yes—he will be here with the man

S/AG G: (Eng) With the man.

AR: (Eng) Right.

S/AG G: (Eng) OK—if I don't like the merchandise—
tell him—if I don't like . . .

AR: (Eng) I already talked about that . . .

S/AG G: (Eng) Well you tell him right now

AR: You know—what I told you—if he
doesn't like the "perico"—we're not go-
ing to buy it.

SL: Of course not. Of course not

AR: What?

SL: If you like—well fine—if not—no good.

AR: (Eng) He says that if you like it to get it—
if you don't like it, he'll try to get
something better.

S/AG G: (Eng) Ok, how much can I . . . How much can
I cut.

AR: How many cuts can we give it—two
or three cuts.

SL: You can give it two cuts—two and a
half cuts, brother.

AR: (Eng) Two and a half.

S/AG G: (Eng) Ok

SL: (Eng) Or maybe, or maybe—(Spanish) you
might yourself check it out—

Government Exhibit 2

AR: Doesn't it have rocks?

SL: Uh?

AR: Stones, it has them?

SL: Yes—little stones

AR: Uh?

S/AG G: (Eng) What does he say?

SL: Very good, You yourself will be checking it out—it will come out to two or even two and a half, and if you have enough for another half it would be three.

AR: (Eng) Two and half maybe three.

S/AG G: Alright but tell him if I don't like it I can just say—I give it back to him and I go . . . He goes his way and I go mine.

AR: Listen . . .

S/AG G: (Eng) Now wait a minute

AR: What we are trying to tell you is if we don't like it—we'll go away and say that we don't like it—or we come back another day—when you think you are able to get something . . .

SL: Of course—something better—I know—so be calm—I have . . . let's let him come, so—if you like it, all's well—if not—nothings wrong

AR: (Eng) He says if you like the stuff we get it—if we don't like it we've just got to wait wait till tomorrow or the day after when he gets something . . .

Government Exhibit 2

S/AG G: (Eng) All right.

AR: (Eng) He gets something better.

S/AG G: (Eng) Alright

AR: (Eng) But he says the stuff is good, you know.

S/AG G: (Eng) Alright, I'm going to . . . Ok—ask him if there is a telephone number where we can call him.

AR: Is there a telephone where we can call you, around here?

S/AG G: (Eng) Could we call him or just come back here?

AR: How do you want to do it—do you want us to call you at some phone—at some place—or do you want us to come back here at ten?

SL: Hum . . .

S/AG G: (Eng) Let's just be back here at ten.

SL: It will be better if you come back

AR: Ok—at ten here.

SL: Yes, at ten—Ok

S/AG G: (Eng) Ten o'clock right back here—(Spanish)
Good-bye friend.

SL: Good-bye—friend. It's better that way
at ten—at ten here—

AR: Ok

SL: So then one way or the other—

AR: Great—

Government Exhibit 2

SL: At any rate—stay calm—(I'll be here

AR: Great—Negro., Ok, great.

(Eng) Hey wait a minute—hey wait—do it when he goes. I don't know.

S/AG G: (Eng) Frank did you copy what went on?

FRANK: (Eng) Yes, Just give me briefly—you are coming back in an hour?

S/AG G: (Eng) Yeah—Code Four—I'm going to meet him back here in an hour.

FRANK: Yeah—why don't you leave and come back in 60 minutes—5—minutes, Scott.

S/AG G: (Eng) Yeah—Code Four—he'll back on this corner at 10 o'clock, whether he has it or not. Code Four.

FRANK: (Eng) Code Four

AR: (Eng) I, I'll talk to Frank—when . . .

FRANK: (Eng) _____

INAUDIBLE

AR: (Eng) I talk to Frank right now . . . what was going

INAUDIBLE

GOVERNMENT EXHIBIT 4

**Conversation Between Special Agent Michael Gray
(S/AG G.), Paul Anibel Romeo (AR), Reynaldo
Santiago Lugo (SL) and Oswaldo Londono Eche-
verry (LE) on January 28, 1974 at Approx-
mately 10:00 P.M.**

AR: (Eng) We are going to see the sample.
NOISE 15 Sec.

S/AG G: (Eng) Tell him, I don't like doing this, tell
him if . . .

AR: (Eng) Yeah, I know—(Spanish) that we don't
want—we don't want to get ripped off.

SL: What do you mean—you don't want
how's that?

AR: Yeah, sure that you want to give us
a hold up. You want to rip us off—you
know—you want to get our money

SL: No, man, No—it's for you to see—if you
like it—if you . . .

S/AG G: (Eng) Hey hand it to me—I'm not gettin in
no car because I don't want to be ripped
off—I don't want to meet your friend—
tell him—I don't want to don't want to
meet your friend all I want to do is see
the merchandise.

AR: And he's right—we're afraid that you
come out with pistols.

SL: No way, no . . .

AR: He doesn't even want to see it . . .

LE: Let's go, let's go, hurry up, let's go.

S/AG G: (Eng) Alright let me see.

Government Exhibit 4

SL: (Eng) No problem, no problem (Spanish) We don't have none of those problems brother, we just want you to see it. (Eng) We want . . .

LE: Leave it—tell him to tell you . . . I'm leaving I'm leaving.

AR: OK he's interested. Tell him, brother that he'll see it brother

S/AG G: (Eng) I'll go too—I can't get in the car tell him that I'm afraid, do you speak English? I'm afraid.

LE: (Eng) I understand, he has no problem with you (spanish) Do you know him?

AR: (Eng) Yeah

LE: Well, the problems are his.

S/AG G: (Eng) I'm his brother, I trust him.

SL: Nobody is asking him for money, or asking him for nothing, we only want to see it—to see it.

AR: (Eng) Its okay no problem, go see it if you like.

S/AG G: (Eng) Look it, But tell him, I'll show him the money.

LE: Look, that I'm all screwed with that stuff here man, tell him that I can't stay here.

AR: (Eng) He's said he doesn't want to see it to into the car, look at it, if you think you can buy it . . .

Government Exhibit 4

S/AG G: (Eng) No can't we stay right here, and look at it?

AR: (Eng) Yes.

S/AG G: (Eng) We are not going to drive somewhere.

LE: (Eng) No, No more, come in here.

S/AG G: (Eng) Paul, Ah, wait right here, you stand right out here and watch.

SL: He thinks we are going to shoot him or something . . .

(CONVERSATION
UNINTELLIGIBLE)

AR: Let's see, let me see

SL: Go in, go in, go in.

AR: (Eng) Let me get in, let me get in.

SL: Nobody is going to do nothing to you.
Nothing—my love.

S/AG G: (Eng) Oh, this is more than a sample. This is an Eighth.
(Spanish) one?

SL: One, no, no it didn't reach for two
brother, no didn't reach for two.

AR: (Eng) Not two

S/AG G: (Eng) Only one, Smells good. Yeah

SL: Yeah, he thinks that we were going to take out a gun, we don't talk bullshit, we are not playing brother—you can't play with that brother.

LE: If he likes that one . . . tell him that I can get him, the other one later.

Government Exhibit 4

SL: For tomorrow, for tomorrow.

AR: (Eng) He says, if you like this one, he can get you this for later, the other one later or both tomorrow. What do you think?

LE: (Eng) Its 10:20 P.M., (Spanish) tell him that no later than 11:30 or 12:00 I can have him the other one.

AR: (Eng) He said 11:30 or 12:00 he has both.

S/AG G: (Eng) I feel the rocks and I smell, smell that, here.

S/AG G: (Eng) Alright—tell him how does he want his money, here take it, it smells good.

AR: (Eng) Well what do you say?

LE: Does he like it or doesn't he?

S/AG G: (Eng) Alright, How much? Good weight.

AR: Ok.—(spanish) How much is it?

LE: I don't know, arrange with him for that.

SL: You already know, you have . . .

AR: Well ok how much per . . . Four thousand?

S/AG G: (Eng) Four thousand, Right?

SL: Yea, Yea

AR: (Eng) But, now, we are going to wait for the other one or what?

(ALL SPEAKING TOGETHER)

LE: Why Four Thousand?

SL: No, no no—look, you know it has a little cut, do you understand?

Government Exhibit 4

AR: Yes

SL: Well no, no we are not going to ask for the four thousand, brother. Ok, ok, so now we'll leave it at thirty-six.

AR: (Eng) \$3,600 Thousand not four, because it's a little cut.

S/AG G: (Eng) How much can it take?

AR: You know they are fair

LE: (Eng) Maybe half, maybe half

S/AG G: (Eng) One

LE: (Eng) In the cut.

AR: Yea,

LE: Yea

(ALL SPEAK AT ONCE)

AR: Okay one on it,

S/AG G: (Eng) How much do they say we can put on it?

AR: (Eng) How many can be put, 2 cuts?

SL: Two cuts, what you want. . . .

S/AG G: (Eng) Two and a half

SL: (Eng) Yes

AR: (Eng) What do you think of that, do we wait for another?

S/AG G: (Eng) Could he get me one more like that?

LE: (Eng) Maybe 12:00 in the night or tomorrow

S/AG G: (Eng) How about if we just get it tonight, this tonight and tomorrow we get the one more.

Government Exhibit 4

LE: (Eng) Okay

S/AG G: (Eng) These are interesting prices, How you want to do? Do you want him to go to get the money?

LE: OK

S/AG G: (Eng) Okay and you wait until he come back and my friend Carlos comes with him.

SL: Ok ok

AR: Alright—ok

SL: You go with them to get the money. No?

AR: (Eng) I go with you to bring the money

S/AG G: (Eng) Yeah Yeah

AR: (Eng) Ok You wait there ?

Pause— noise 5 sec.

AR: You don't want to wait?

LE: (Eng) I park in the other side, ok

S/AG G: (Eng) No it's better if we don't drive around.

AR: Wait here, until he comes with the money, ok? He has to count out the money and all . . .

S/AG G: (Eng) Does he have the merchandise or does the guy in the car?

AR: (Eng) Yes, he's got it in his coat.

NOISE

S/AG G: (Eng) The guy?

SL: Tomorrow the next one.

Government Exhibit 4

NOISE

AR: It's because we don't have any phone where to call you.

S/AG G: (Eng) Well, they can get one more right?

AR: Yes

S/AG G: (Eng) Tell him that I have the money in the trunk, just tell him, I have my money—I put the money in trunk—ok—and also tell him to Montana the guy in the car—in the Ford—ok?

AR: (Eng) What?

S/AG G: (Eng) Yeah—to Montana the guy in the Ford—do you understand?

AR: (Eng) No, No.

S/AG G: (Eng) Okay, well

AR: (Eng) Get in the car

S/AG G: (Eng) Tell him to get inside and we'll count it on the inside.

AR: Out He says he has to count it out.

NOISE

S/AG G: (Eng) Shut the door, Montana the guy in the car,

AR: Around the corner, Yeah ok he has it with him, he has it with him.

NOISE, 10 Sec.

AR: (Eng) Around the corner, around the corner he is ok around the corner. go ahead

NOISE

AR: (Eng) Around the corner.

AFFIDAVIT OF MA

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

PAUL BERGMAN, being duly sworn,
day of December, 1974, I deposited in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn,
State of New York, a BRIEF AND APPENDIX,
of which the annexed is a true copy, contained in a sealed
envelope, directed to the person hereinafter named, at the place

William J. Gallagher
Federal Defender Service
Legal Aid Society
509 U.S. Courthouse
Foley Square, N.Y.

Sworn to before me this
27 day of October 1974

Paul Blotter
Court Clerk
Eastern District of New York

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FOR APPELLEE

securely enclosed postpaid wrapper

e and address stated below:

er, Esq.
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John P. Bla